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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LUPE MARIA MANRIQUEZ, Defendant and Appellant.	D068653 (Super. Ct. No. SCD259938)

APPEAL from an order of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

Joshua M. Mulligan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Lupe Maria Manriquez appeals an order denying her motion to withdraw her guilty plea for sale of a controlled substance under Health and Safety Code section

11379, subdivision (a).[1] She contends: (1) the trial court abused its discretion by denying her motion to withdraw her guilty plea; and (2) her counsel at the time of the plea was constitutionally ineffective. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Manriquez was admitted to the United States in 1967 as a lawful legal permanent resident. Since 1985, Manriquez has been convicted of five felony offenses, which resulted in three grants of formal probation and one grant of summary probation.[2]

In December 2014, Manriquez was arrested for selling methamphetamines to an undercover police officer. She was charged with violating section 11379, subdivision (a).[3]

Public Defender Manuel Avitia was appointed as Manriquez's counsel. On December 15, the prosecutor offered Manriquez a plea deal that stipulated to a grant of probation and dismissal of the balance of the complaint, despite Manriquez's ineligibility for probation under Penal Code section 1203. Manriquez accepted the plea deal and pled guilty to a violation of section 11359.

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1 All further statutory references are to the Health and Safety Code unless otherwise specified.

2 Manriquez filed multiple petitions in the trial court to recall her various sentences under Proposition 47, the Safe Neighborhoods and Schools Act, but none of these petitions are before us in the instant matter.

3 At the time of this offense, Manriquez was in removal proceedings for her prior felony convictions, but was eligible for discretionary relief of cancellation for removal.

Avitia explained the change of plea form to Manriquez, and wrote the factual basis for the plea as "I unlawfully sold meth to an undercover police officer." Manriquez signed the change of plea form, and initialed the box next to the following statement: "I understand that if I am not a U.S. citizen this plea of Guilty/No Contest may result in my removal/deportation, exclusion from admission to the U.S. and denial of naturalization. Additionally, if this plea is to an 'Aggravated Felony' listed on the back of this form, then I will be deported, excluded from admission to the U.S., and denied naturalization."

Before accepting her change of plea, the court asked Manriquez whether she understood the terms of her plea and the deportation consequences it entailed. Manriquez indicated that she understood the charges, Avitia answered any questions she had, and she had no questions for the court.

Before sentencing, Manriquez retained new counsel and filed a motion to withdraw her guilty plea. After conducting a hearing and considering the evidence presented, the superior court denied Manriquez's motion.

Manriquez timely appealed the order.

DISCUSSION

I

MANRIQUEZ'S MOTION TO WITHDRAW HER GUILTY PLEA

Manriquez contends the superior court abused its discretion when it denied her motion to withdraw her guilty plea. We disagree.

A. Background

In moving to withdraw her guilty plea, Manriquez claimed her guilty plea was not knowing and voluntary because she mistakenly believed her immigration attorney had approved the plea agreement, she was coerced into changing her plea, and her attorney failed to adequately assist her. In support of her motion, Manriquez submitted her own declaration, in which she claimed: (1) her codefendant, with whom she was confined in a small holding cell, pressured her to plead guilty, hurling insults at her; (2) Avitia told her the prosecutor's offer of probation and time served was "great" and "no one would bring . . . a better deal"; (3) Manriquez asked to speak to her immigration attorney who was working to fight deportation proceedings in federal immigration court arising from her prior crimes, but Avitia told her it would be "a waste of time"; (4) Avitia said he had conferred with her immigration attorney and the latter had approved of the plea agreement; and (5) Manriquez would have been willing to plead to a crime with a long period of incarceration to avoid deportation.

Manriquez's immigration attorney, Miko Tokuhama-Olsen, also provided a declaration. Tokuhama-Olsen declared that she introduced herself to Avitia on December 8, 2014, and they agreed to talk after the trial readiness conference on December 15. Tokuhama-Olsen expected an "update on possible negotiations" and to "help [Avitia] with appropriate plea bargains[.]" According to Tokuhama-Olsen, when she and Avitia talked again on December 15, she was "shocked" when she learned Manriquez had pled guilty. Tokuhama-Olsen declared that Avitia had told her that the prosecutor felt his case was strong and the prosecutor "would never go for a

misdemeanor and would settle for nothing less than a sales plea." Tokuhama-Olsen suspected Avitia made no effort to counteroffer for a more favorable immigration outcome, such as by pleading to a crime to sell methamphetamine (§ 11352), which would have resulted in a longer custody term, but not necessarily trigger deportation.

At the hearing on Manriquez's motion, the court took evidence, including testimony. Avitia testified that he was "very mindful of trying to avoid a conviction that would implicate deportation[,]" and it was his goal "to try to avoid deportation to the extent [it was] a viable option." He stated that he was aware immigration proceedings were pending against Manriquez and she would be deported if she was convicted. He admitted that he did not consult with an immigration law expert because he understood the immigration implications of Manriquez's case. Avitia testified that he negotiated with the prosecutor and "tried to obtain something other than the [crime] that was charged[.]" He stated that inherent in such negotiations is an effort to "avoid the necessity for any type of immigration ramifications." He testified that his strategy "was to see if [he] could get [the prosecutor to agree to] something that would not implicate deportation proceedings."

Avitia indicated that he thoroughly discussed the case with Manriquez, including immigration consequences. He testified that he informed Manriquez that he had talked to Tokuhama-Olsen. Avitia stated that Manriquez expressed she wanted credit for time served. In other words, Manriquez wanted to reduce the actual amount of time she would be in custody.

When Avitia conveyed the plea deal to Manriquez, she chose to take the deal despite knowing it would result in deportation. Before accepting the deal, Manriquez did not ask to talk to Tokuhama-Olsen or inquire whether Tokuhama-Olsen was "okay" with the plea agreement. Avitia vigorously denied that he told Manriquez that Tokuhama-Olsen had signed off on the plea agreement.

In addition, Avitia explicitly stated that he did not tell Manriquez that the plea deal was "great" and there would not be a better deal offered. In fact, Avitia made clear that he would "never ever" say such a thing to a client because it would not be accurate. Nevertheless, Avitia indicated that he thought it unlikely that the prosecutor would subsequently offer anything more favorable to Manriquez.

Avitia explained that although he had not formed an opinion as to Manriquez's actual charges if her case was taken to trial, considering the anticipated evidence against her (marked bills in her possession, confirmation that the substance she sold to the undercover officer was methamphetamine, and incriminating statements she made), "the prospects of [a] jury trial would not have been particularly favorable[.]"

Regarding the behavior of Manriquez's codefendant with whom she was being held in a cell, Avitia testified that Manriquez was angry and aggressive. In fact, in Avitia's presence, Manriquez threatened repeatedly to beat her cellmate. The codefendant yelled for help, and Avitia was concerned that Manriquez would be charged for making criminal threats and advised her to stop threatening the other woman.

After considering the evidence presented, the superior court denied the motion, noting:

> "I am going to deny the motion. I believe that there has not been clear and convincing evidence that just -- for good cause to withdraw the plea. [¶] As it relates to the credibility issues, I believe that those have already been addressed, and that I indicated Mr. Avitia found to be very credible. I also, when you compare it to not only the -- Mr. Avitia's testimony, but also the change of plea form, as well as the transcript, that Ms. Manriquez did make a knowing and intelligent and voluntary waiver of her rights, and plead guilty notwithstanding the knowledge that she knew she was going to be deported because of this being an aggravated felony. [¶] I also believe that there was no ineffective assistance of counsel and to the contrary. Based on Mr. Avitia's testimony, I believe he provided Ms. Manriquez the opportunity to exercise her rights to plead and that, in fact, she did it with appropriate representation and advice of counsel. [¶] I believe that there is not any undue influence, both based on the testimony I heard, as well as the statements of Ms. Manriquez when the plea was taken that she wasn't threatened or coerced in any way."

B. The Law

A guilty plea may be withdrawn at any time before judgment upon a showing of good cause, which must be established through clear and convincing evidence. (Pen. Code, § 1018; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1457.) Where a defendant claims a mistake of fact exists, the defendant must show the plea would not have been accepted absent the mistake. (*People v. Nocelotl* (2012) 211 Cal.App.4th 1091, 1097; *People v. Kunes* (2014) 231 Cal.App.4th 1438, 1443.) However, a "[d]efendant's unwilling acceptance of his counsel's advice is not a '. . . factor overreaching defendant's free and clear judgment.' " (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103, quoting *People v. Urfer* (1979) 94 Cal.App.3d 887, 892 (*Urfer*).)

The withdrawal of a plea of guilty is within the sound discretion of the trial court, and the trial judge's decision will not be disturbed on appeal unless an abuse of discretion is demonstrated. (*Urfer, supra*, 94 Cal.App.3d at pp. 891-892.) In reviewing the trial

court's decision, we accept the factual findings if supported by substantial evidence. (*People v. Harvey* (1984) 151 Cal.App.3d 660, 667 (*Harvey*).) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Inferences may constitute substantial evidence, but "[w]here two conflicting inferences may be drawn from the evidence, it is the reviewing court's duty to adopt the one supporting the challenged order." (*People v. Hunt, supra,* 174 Cal.App.3d 95, 104, citing *Harvey, supra*, at p. 667.)

C. Analysis

Here, Manriquez's challenge to the court's order denying her motion for new trial relies entirely on this court rejecting the evidence the superior court found credible (i.e., Avitia's testimony) and believing her declaration in its entirety. We decline to do so.

On the witness stand, under oath and before the court, Avitia unequivocally denied all of Manriquez's assertions. He also testified that he fully advised Manriquez of the immigration consequences of accepting the plea deal, and that she chose to enter her plea because it allowed her to get out of custody as soon as possible. The court found this testimony "very credible." In making such a finding, the court implicitly rejected Manriquez's contradictory assertions in her declaration. This discerning of the truth is the unique province of the factfinder, who, "because [it] can observe the demeanor of a witness, is in the best position to assess credibility[.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 835, citing *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 78.) Accordingly, we agree with the superior court that Manriquez failed to prove by clear and

convincing evidence she was misled about her immigration attorney's evaluation of the People's offer, and her alleged "mistake" in that regard did not provide grounds to withdraw the guilty plea.

In addition, we conclude that the evidence did not show Manriquez was coerced into pleading guilty by an abusive codefendant. In fact, based on the implied findings of the superior court, it was Manriquez who was threatening and verbally abusive to her codefendant. As such, the court specifically found there was no clear and convincing evidence of coercion. Because that finding is supported by substantial evidence, we must uphold it. (See *Harvey*, *supra*, 151 Cal.App.3d at p. 667; *People v. Speaks* (1981) 120 Cal.App.3d 36, 40.)

In short, on the record before us, we conclude the superior court did not abuse its discretion in denying Manriquez's order to withdraw her guilty plea.

II

INEFFECTIVE ASSISTANCE OF COUNSEL

A. Manriquez's Contentions

Manriquez asserts her counsel was ineffective for (1) failing to negotiate a plea agreement that would mitigate her deportation consequences and (2) for writing "meth" on the change of plea form instead of "controlled substances," which allegedly impacted the likelihood of obtaining deportation relief in subsequent immigration proceedings. Although Manriquez was informed of the deportation consequences of a guilty plea, she urges this court to find her counsel ineffective for failing to take reasonable steps to preserve her immigration rights. We reject this request.

B. The Law

The Sixth Amendment guarantees a defendant "the right to have counsel present at all 'critical' stages of the criminal proceeding." (*Montejo v. Louisiana* (2009) 556 U.S. 778, 786.) The right to counsel is the right to effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) To show that trial counsel's performance was constitutionally defective, an appellant must prove: (1) counsel's performance fell below the standard of reasonableness, and (2) the "deficient performance prejudiced the defense." (*Id.* at pp. 687-688.) Competency is presumed unless the record affirmatively excludes a rational basis for trial counsel's choice. (*People v. Ray* (1996) 13 Cal.4th 313, 349 (*Ray*); *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260.)

We generally defer to the tactical decisions of trial counsel. (See *People v. Scott* (1997) 15 Cal.4th 1188, 1212; *People v. Holt* (1997) 15 Cal.4th 619, 703.) "[T]here is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 437, quoting *Strickland*, *supra*, 466 U.S. at p. 689.)

In examining whether a defendant met his burden on the first prong, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, *supra*, 466 U.S. at p. 689; *People v. Hinton* (2006) 37 Cal.4th 839, 876.) We will not find ineffective representation "unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

An appellate court generally cannot fairly evaluate counsel's performance at trial based on a silent record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) However, in the instant matter, Manriquez argued that she should be able to withdraw her guilty plea based, in part, on a claim that her counsel was constitutionally ineffective. As such, the court heard evidence regarding whether Manriquez's counsel's representation fell below the relevant standard of reasonableness. The trial court found that it did not.

However, in regard to a claim of ineffective assistance of counsel, the trial court's findings are " 'not binding on this court, and we may reach a different conclusion on an independent examination of the evidence produced at the hearing he conducts even where the evidence is conflicting.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 219, quoting *In re Branch* (1969) 70 Cal.2d 200, 203, fn. 1; see *People v. Cromer* (2001) 24 Cal.4th 889, 901.) The factual findings of a trial court are entitled to deference "only if substantial and credible evidence supports the findings." (*In re Hitchings* (1993) 6 Cal.4th 97, 109; see *In re Avena* (1996) 12 Cal.4th 694, 710.)

C. Analysis

Manriquez contends Avitia's performance fell below an objective standard of reasonableness for failing to explore plea options that would avoid negative immigration consequences. However, she does not cite to any evidence that actually supports her position. Instead, she claims that Avitia misunderstood the custody term involved in the charged crime. She notes that after the Criminal Justice Realignment Act of 2011, a violation of section 11379 is punishable by a multiple-year-long period of incarceration

that is served in a local facility rather than a state prison. (See § 11379, subd. (a); Pen. Code, § 1170, subd. (h)(2).) And she points to the following testimony from Avitia:

> "In theory . . . a felony is a prison case, where [Manriquez] is exposed to prison. [¶] Do I think that this is a case that warrants prison? Absolutely not. I don't think this is a case that warranted prison. And I distinguish prison from jail. With that being said, it certainly exposed her to more local time, and that -- that exposure to prison did exist."

Manriquez insists this testimony shows that Avitia was confused by the type of custody term she faced, and as such, his confusion affected Avitia's "tactical and strategic considerations." Not so.

Although Avitia's comments could have been more artfully stated, we find nothing in what he said to undermine his testimony that he attempted to negotiate a plea deal with the prosecutor that would avoid deportation proceedings. Moreover, there is substantial evidence in the record that Manriquez wanted to reduce the amount of time she was in custody and understood that by pleading guilty she would be subject to deportation proceedings. Against this backdrop, there is nothing beyond the speculation of Manriquez and her immigration attorney that Avitia did not try to negotiate a plea deal that avoided deportation consequences to Manriquez.

Instead of directly addressing the evidence in the record, Manriquez cites *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*) and *People v. Bautista* (2004) 115 Cal.App.4th 229 (*Bautista*) as support for her position that Avitia's representation of her fell below the standard of reasonableness. Neither case is the panacea to cure the ills of Manriquez's arguments.

In *Padilla,* the Supreme Court concluded that defense counsel was constitutionally deficient for failing to inform the defendant of the deportation consequences of his guilty plea. (*Padilla*, *supra*, 559 U.S. at p. 374.) Specifically, the defense attorney stated there would be no immigration consequences when the defendant pled guilty to the transportation of marijuana. (*Id.* at p. 359.) Defense counsel was incorrect. (*Id*. at p. 374.) The court determined the defense counsel's performance fell below an objective standard of reasonableness because the deportation consequences were clear on the face of the statute, and it was counsel's duty to correctly inform his client of a plea's adverse immigration consequences. (*Id.* at p. 369.)

No such analogous facts exist in the instant matter. To the contrary, Avitia informed Manriquez of the deportation consequences of a guilty plea. Accordingly, *Padilla*, *supra*, 559 U.S. 356 is not instructive here.

Likewise, *Bautista*, *supra*, 115 Cal.App.4th 229 is not helpful to Manriquez's position. In that case, the defendant alleged he was prejudiced by his trial attorney's deficient representation because the attorney did not advise him that deportation and exclusion from readmission were consequences of his plea, and the attorney did not attempt to negotiate a plea deal to avoid deportation. (*Id*. at p. 237.) The appellate court issued an order to show cause to the trial court to conduct an evidentiary hearing on the question of counsel's advice respecting the plea. (*Id*. at p. 242.) In the instant matter, the superior court already conducted an evidentiary hearing on these issues, and found against Manriquez. Consequently, *Bautista* does not aid Manriquez for this reason.

Additionally, *Bautista, supra,* 115 Cal.App.4th 229 is distinguishable from the instant matter on other grounds. The evidence in *Bautista* showed that the defense attorney's strategy was simply to bargain for "the most lenient sentence possible." (*Id*. at p. 238.) There was no evidence of the defense counsel's effort to negotiate a deal that would avoid deportation. Further, an immigration attorney provided a declaration as an expert witness that in at least five cases in which he was personally involved, the prosecutor agreed to allow a defendant charged with drug sales to " 'plead upward,' " defined as pursuing a negotiated plea for a violation of a greater but nonaggravated offense that would carry a longer prison sentence but not result in deportation. (*Ibid*.) Evidence in *Bautista* showed that the defense attorney never contemplated such a strategy. (*Ibid*.)

Here, the facts are very different. In contrast to the defense attorney in *Bautista*, Avitia testified that he attempted to negotiate a plea deal that would not implicate deportation proceedings. Moreover, unlike the defendant in *Bautista* who offered expert witness testimony that another plea deal was possible, here Manriquez offered no such evidence. In light of these critical distinctions, instead of supporting Manriquez's position here, *Bautista, supra,* 115 Cal.App.4th 229 undermines it.

In addition, Manriquez argues Avitia provided ineffective assistance of counsel because he specified in the plea agreement that she sold methamphetamine rather than just stating she sold a controlled substance. Manriquez observes that California's and the United States' controlled substance list differ slightly, and accordingly to Tokuhama-Olsen, had Avitia not named the actual controlled substances, "defenses could have still

been available . . . in [i]mmigration court."[4] In other words, Manriquez insists Avitia's representation of her fell below the standard of reasonableness because he was not less specific in identifying her actual crime on the plea agreement. We reject this contention.

As a threshold matter, Manriquez offers no evidence that a defense attorney's representation falls below the relevant standard of reasonableness when he or she lists the actual controlled substance a defendant attempted to sell on a plea agreement rather than just listing the ambiguous phrase "controlled substance." Nor does she offer any authority that requires a defense attorney to participate in such chicanery. Such a failing is fatal to her cause as Manriquez has not satisfied her burden under the first prong of *Strickland*, *supra*, 466 U.S. 668.[5]

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[4] Beyond this conclusory statement, Tokuhama-Olsen fails to explain what additional arguments she would have possessed if Avitia wrote "controlled substance" instead of "meth" on the plea agreement. Thus, without additional foundation or explanation, we view this portion of Tokuhama-Olsen's declaration as speculative and disregard it.

[5] Having determined that Manriquez failed to satisfy the first prong of the *Strickland* test, we need not address her arguments with respect to the second prong. (*Strickland*, *supra*, 466 U.S. at p. 697.)

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.